



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue queen ouest
Toronto ON M5H 3S8

**IN THE MATTER OF THE *COMMODITY FUTURES ACT*,
R.S.O. 1990, C.20, AS AMENDED**

- AND -

**IN THE MATTER OF
FAWAD UL HAQ KHAN and KHAN TRADING ASSOCIATES INC. carrying on
business as MONEY PLUS**

**REASONS AND DECISION
(Sections 60 and 60.1)**

Hearing: April 13, 2015

Decision: May 13, 2015

Panel: James D. Carnwath Q.C. - Chair of the Panel
- Commissioner

Appearances: Tamara Center - For Staff of the Commission
Anna Huculak

Fawad Ul Haq Khan - For Himself

TABLE OF CONTENTS

I. Background 1

II. Merits Decision..... 2

III. Sanctions and Costs Requested 2

 A. Staff’s Position 2

 B. The Respondent’s Position 4

IV. The Law on Sanctions 6

V. Analysis 6

VI. Decision on Sanctions and Costs 7

REASONS AND DECISION ON SANCTIONS AND COSTS

I. BACKGROUND

- [1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to sections 60 and 60.1 of the *Commodity Futures Act*, R.S.O. 1990, C.20, as amended (the "**CFA**"), to consider whether it is in the public interest to make an order with respect to sanctions and costs against Fawad Ul Haq Khan ("**Khan**") and Khan Trading Associates, carrying on business as Money Plus ("**KTA**" or "**Money Plus**") (together, the "**Respondents**").
- [2] The hearing on the merits was held over the course of twenty hearing days (the "**Merits Hearing**") and the decision on the merits was issued on December 29, 2014 (*Re Khan et al.* (2015), 38 O.S.C.B. 61)(the "**Merits Decision**").
- [3] On April 13, 2015, the Commission held a hearing to consider submissions from Staff and the Respondents regarding sanctions and costs (the "**Sanctions Hearing**"). Khan represented himself and KTA during the Merits Hearing and the Sanctions Hearing.
- [4] The Notice of Hearing in this matter was issued on December 20, 2012. On June 24, 2013, the Commission heard a motion to determine the Respondents' request to have Staff of the Commission's ("**Staff**") electronic disclosure provided in printed form. The Commission ordered Staff to provide one full hard copy of its disclosure documents to the Respondents.
- [5] On August 14, 2013, the Commission heard a motion regarding the Respondents' witnesses (the "**Witness Motion**"). In written reasons dated October 23, 2013, the panel held that the evidence of all 679 account holders the Respondents proposed to call to testify would be unduly repetitious in this case. Instead, the panel ordered that the Respondents could call 18 witnesses as a representative sample of that group and deferred to the panel on the Merits Decision regarding summoning other specific individuals (*Re Fawad Ul Haq Khan et al.* (2013), 36 O.S.C.B. 10485).
- [6] On December 16, 2013, the Commission heard a motion brought by the Respondents requesting: (a) the dismissal of the proceeding against them; (b) the revocation or variation of the Witness Motion decision; and (c) that the proceeding be heard by another panel member based on the claim of bias (the "**Dismissal, Reconsideration and Bias Motion**"). In written reasons dated January 17, 2014, the panel delivered its decision in the Dismissal, Reconsideration, and Bias Motion, finding that it was not appropriate in the circumstances to grant a dismissal of the proceeding or to find that a reasonable apprehension of bias existed and was not satisfied that it was in the public interest to revoke or vary the Witness Motion decision (*Re Fawad Ul Haq Khan et al.* (2014), 37 O.S.C.B.).
- [7] On April 6, 2015, the Commission received a request by email from Khan for an adjournment of the Sanctions Hearing so that Khan could visit family in the United States. In denying the request, the panel noted that Khan had ample notice of the date of the Sanctions Hearing and that the panel had previously, where possible, accommodated any requests made by Khan. For example, during the Merits Hearing, the panel acceded to Khan's request made on Thursday, May 8, 2014, that on the following day, Friday, May 9, 2014 and every Friday

following on which the Merits Hearing was to occur, the Merits Hearing adjourn at 1:30 p.m. to accommodate his religious obligations, notwithstanding that the Merits Hearing had been scheduled for multiple Fridays until 4:30 p.m., of which Khan had knowledge far in advance of the time of the request.

- [8] At the Sanctions Hearing, Khan requested that the panel grant him an adjournment due to the fact that he had dismissed his counsel moments before the beginning of the Sanctions Hearing and was therefore unprepared to continue. The panel found that the Sanctions Hearing should continue as scheduled and denied Khan's request for an adjournment.
- [9] These are my Reasons and Decision as to the appropriate sanctions and costs order against Khan and KTA.

II. MERITS DECISION

[10] In the Merits Decision, the Panel concluded that:

- a. The Respondents engaged in the business of trading in commodity futures contracts without being registered to do so and without an exemption from the dealer registration requirement, contrary to subsection 22(1)(a) of the CFA;
- b. The Respondents engaged in the business of advising in commodity futures contracts without being registered to do so and without an exemption from the adviser registration requirements, contrary to subsection 22(1)(b) of the CFA;
- c. The Respondents made misleading and untrue statements to Staff during the course of its investigation into the Respondents' conduct and business, in breach of subsection 55(1)(a) of the CFA; and
- d. The Respondents acted contrary to the public interest.

III. SANCTIONS AND COSTS REQUESTED

A. Staff's Position

[11] Staff requests that the following order be made by the panel:

- a. An order that any exemptions contained in Ontario commodity futures law do not apply to the Respondents permanently, pursuant to paragraph 3 of subsection 60(1) of the CFA;
- b. An order that the Respondents be reprimanded, pursuant to paragraph 6 of subsection 60(1) of the CFA;
- c. An order that Khan resign one or more positions that he holds as a director or officer of any issuer, pursuant to paragraph 7 of subsection 60(1) of the CFA;
- d. An order that Khan is prohibited from becoming or acting as a director or officer of any issuer, pursuant to paragraph 8 of subsection 60(1) of the CFA;
- e. An order that Khan pay an administrative penalty of \$200,000 for failure to comply with Ontario commodity futures law, pursuant to paragraph 9 of subsection 60(1) of the CFA;

- f. An order that KTA pay an administrative penalty of \$200,000 for failure to comply with Ontario commodity futures law, pursuant to paragraph 9 of subsection 60(1) of the CFA;
 - g. An order that the Respondents disgorge to the Commission the sum of \$366,324.71 obtained as a result of the non-compliance with Ontario commodity futures law, pursuant to paragraph 10 of subsection 60(1) of the CFA;
 - h. An order that the Respondents pay a portion of the costs of the Commission investigation and the hearing in the amount of \$191,252.43, pursuant to section 60.1 of the CFA; and
 - i. Such other orders as the Commission may deem appropriate.
- [12] Further, Staff request that the Commission order that any amounts paid to the Commission in compliance with the administrative penalty and disgorgement orders be allocated to or for the benefit of third parties or for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets, in accordance with subsection 3.4(2)(b) of the *Securities Act*, RSO, c. S.5, as amended (the "**Act**").
- [13] In Staff's submission, the sanctions requested are proportionate to the Respondents' conduct and the sanctions should deter the Respondents and others from engaging in the same or similar conduct in the future by attaching meaningful consequences to the Respondents' actions.
- [14] Staff submits that significant administrative penalties are warranted due to the seriousness of the findings against the Respondents. Staff rely on the Commission's finding in *Norshield* (defined below) that:
- Misleading Staff and failing to state facts that should have been stated in Staff's investigation is also a very serious breach of Ontario securities law, which calls for substantial administrative penalties.
- ...
- Even considering these mitigating factors, failing to inform Staff of an important component of the investment structure warrants a significant administrative penalty.
- (Re Norshield Asset Management (Canada) Ltd. (2010), 33 O.S.C.B. 7171 at paras. 106-107)*
- [15] In Staff's submission, that the Respondents were found to have mislead Staff as well as to have breached the important registration requirements for trading and advising, meets the standard set out above in *Norshield* for serious administrative penalties.
- [16] Further, Staff argues that if the panel were to only require the Respondents to disgorge the commissions they illegally obtained, such an order would amount to an interest-free loan for the Respondents (Staff's Submissions at para. 40).
- [17] Staff submits that the Respondents should disgorge US\$366,324.71, representing all amounts earned from investors by way of commissions from the

brokerages, based on the following analysis of factors set out in *Re Limelight Entertainment Inc.* ((2008), 31 O.S.C.B. 12030 at para. 52):

- a. The commissions obtained were as a result of the Respondents' illegal trading and advising;
- b. The Respondents' misconduct was extremely serious and investors were seriously harmed by it;
- c. The amounts obtained by the Respondents have been precisely ascertained;
- d. It does not appear likely that investors will be able to recoup any of their losses; and
- e. A disgorgement order for all of the commissions earned by the Respondents would have a significant specific and general deterrent effect.

(Staff's Submissions at para. 49.)

- [18] Staff further submits that the disgorgement remedy is needed to ensure that the Respondents do not retain any financial benefit from their illegal actions. This should be done on a joint and several basis given that Khan was the directing mind of KTA and the evidence demonstrated that the KTA's actions were indistinguishable from Khan's (Staff's Submissions at para. 51).
- [19] In Staff's submission, the Respondent's should be required to pay significant costs of the investigation and hearing due to misleading Staff throughout the investigation, bringing frivolous motions, insisting on conducting a hearing on issues that should have been admitted, calling repetitive and irrelevant evidence, failing to meet timelines and providing inconsistent and disingenuous evidence (Staff's Submissions at para. 57).
- [20] Staff requests that the Respondents pay, on a joint and several basis, \$191,252.43 towards the costs of the proceeding. Notwithstanding their submission above, Staff notes that this represents an 84.5% discount from the true amount of costs incurred and as a result, in its submission, believes that this represents a conservative approach to costs that is proportionate and reasonable in all of the circumstances.

B. **The Respondent's Position**

- [21] The Respondents submitted written materials by way of their counsel, including, written submissions on sanctions and costs, an Affidavit of Fawad Khan, sworn March 6, 2015, and a book of authorities (collectively, the "**Written Submissions**"). As stated above, the Respondents dismissed their counsel shortly before the Sanctions Hearing. However, as the Written Submissions were not disclaimed by Khan during the Sanctions Hearing, I have considered them in making my decision on sanctions and costs. Given the circumstances though, to the extent that there is any disagreement or inconsistency between the Written Submissions and the oral submissions given by Khan at the Sanctions Hearing, I have preferred the oral submissions of Khan for the purposes of these reasons and decision.

- [22] The Respondents submit that they do not oppose the non-monetary sanctions requested by Staff, but that this is not an appropriate case for administrative penalties, disgorgement or costs. In their opinion, the monetary sanctions sought by Staff are punitive, and therefore outside the scope of the Commission's authority (Respondents' Submissions at para. 13). Khan submits, in the alternative, that if the panel feels that a monetary penalty is needed, a penalty of a more reasonable size, in the range of \$500 to \$5,000, would be more appropriate given the circumstances (Transcript p. 80 l. 7-19).
- [23] In support of their argument that Staff's sanctions are overreaching, the Respondents argue that the case law relied on by Staff deals with the conduct of registrants, which the Respondents were not (Transcript p. 68 l. 4-15). Khan argues that his actions be considered less serious than those with actual knowledge of Ontario securities law (Respondents' Submissions at para. 20).
- [24] Khan further submits that the case law relied on by Staff concerned respondents who profited fraudulently from their conduct and that there is no such finding against him (Transcript p. 77 l. 19-25).
- [25] The Respondents submit that a number of mitigating factors should be taken into consideration by the panel when determining if there should be any additional sanctions to those already agreed to. Khan argues that any breaches of the CFA were not intentional and that he "lacked a "higher awareness" of the requirements under Ontario securities laws and could not understand the impact his actions may have on the capital markets" (Respondents' Submissions at para. 19). He submits that taking into consideration the respondent's intention is appropriate when considering sanctions (*Re Sabourin* (2009), 32 O.S.C.B. 2707 at paras. 70-71). Khan submits that it was his only intention to help his students and that in *Re Gold-Quest International* ((2014), 38 O.S.C.B. 273 at para. 11) the Commission considered "genuine belief in the [recommended] investment" to be a mitigating factor.
- [26] Khan submits that the present proceeding and the Merits Hearing before it, have significantly damaged his reputation in his community and as such will have the impact of limiting his future potential involvement in the capital markets.
- [27] Khan further submits that he is remorseful if he caused "damage" to anyone (Transcript p. 78 l. 8-17). Khan also clarified that he did not intend to be hostile to Staff at any point in the proceeding and that he only interrupted oral submissions if he believed that Staff was misstating an issue (Transcript p. 78 l. 18-24).
- [28] Khan submits that he does not have the resources to pay the administrative penalty or the disgorgement requested (Transcript p. 72 l. 15-24). Furthermore, Staff, in his opinion, has overstated the requirements for specific and general deterrence in light of the Respondents' circumstances. Given the damage already done to his reputation and the non-monetary sanctions, Khan submits that specific deterrence is served. Regarding general deterrence, Khan submits that courts have previously recognized that publicity and reputational harm are a "powerful deterrent and have the effect of dissuading others from engaging in similar conduct" (Respondents' Submissions at para. 38(b)).
- [29] During oral submissions, Khan argued that the costs submitted by Staff are inflated and "are not the reality" (Transcript p. 74 l. 20-21). Given Khan's

advanced age and that his only income is from the Canadian Pension Plan and Old Age Security payments, the Respondents submit that any costs award would be punitive in its effect.

IV. THE LAW ON SANCTIONS

- [30] Pursuant to subsection 1.1(1) of the CFA, the Commission has the mandate to: (a) provide protection to investors from unfair, improper or fraudulent practices; and (b) foster fair and efficient commodity futures markets and confidence in those markets. As stated by the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132, the Commission's public interest mandate is neither remedial nor punitive; instead, it is protective and preventative, and it is intended to prevent future harm to Ontario's capital markets (at para. 42).
- [31] Keeping in mind the Commission's prospective mandate, I must also consider the specific circumstances in this case and ensure that the sanctions are proportionate to the conduct found to have occurred (*Re M.C.J.C. Holdings* (2002), 25 O.S.C.B. 1133 at 1134).

V. ANALYSIS

- [32] As stated above, Staff obtained agreement from Khan on the sanctions requested in paragraph [11](a), (b), (c), and (d). It is therefore left for me to determine whether the monetary sanctions requested by Staff, namely administrative penalties, disgorgement and costs, are warranted in this case.
- [33] During the Sanctions Hearing Staff endeavoured to have Khan admit to certain courses of conduct to no avail. When asked questions by Staff, it was Khan's custom to change the subject to refer to matters he clearly felt more important, including false explanations for conduct previously addressed at the Merits Hearing.
- [34] Staff's submissions on sanctions were forthright and not unduly harsh given the breaches of commodity futures law found by the panel at the Merits Hearing. Further, I find that Staff's submissions were properly supported by the precedents they cited.
- [35] During his submissions Khan repeated his request for an adjournment citing ill health and absence of counsel. His lack of counsel was entirely due to Khan dismissing his counsel on the morning of the Sanctions Hearing and I therefore denied his request.
- [36] Khan is a most unusual witness, difficult to control and incapable of taking direction from the panel whenever a ruling does not meet his needs. He quickly shifts from one topic to another, inevitably leading to a litany of injustices that Staff and the panel have inflicted upon him. For example, during Khan's submissions on the appropriateness of the administrative penalties sought by Staff at the Sanctions Hearing, the panel had the following exchange with Khan:

CHAIR: And that is your argument for not having to pay the \$200,000 is you haven't had time to prepare; is that right?

MR. KHAN: No, no, no. That will be also one

of the thing but for entire case, for entire case. I don't want to breach any law nor I had intention in the past to breach any law. Being a law graduate, I respect law. So, I want to respect law and I want to do the things according to the law. If anything, I have done which this thing is against the law and I didn't do it. So, I said in my hearing I'm sorry for it. It was not to -- I am a teacher and a teacher is like a father, and I didn't want to harm my children. But if anything has been done, it is done not consciously, maybe unconsciously, or by mistake or by misunderstanding. So, I'm not a person who will harm somebody, who will violate the law, no, no, no.

The undertaking they are saying again and again the entire story of undertaking is entirely different, and they misled the members and the panel about talking about undertaking again and again. And the student entirely opposite to this. And that's why I give undertaking to in good faith without consulting an attorney and that's my mistake, I agree with it.

(Transcript p. 69 l. 5 – p. 70 l. 3)

[37] This approach by Khan I observed as a member of the panel in the Merits Hearing and I was not surprised to experience its continuation in the Sanctions Hearing. I find Khan to be a totally unreliable witness, incapable of responding to examination by Staff or direction from the panel.

[38] I should make it clear that my acceptance of Staff's submissions on the appropriateness of the suggested sanctions is in no way influenced by Khan's conduct. The fact that Khan was unmanageable in the course of the Sanction's Hearing has no bearing on the strength of Staff's submissions.

VI. DECISION ON SANCTIONS AND COSTS

[39] In my view, it is important in this case to: (1) impose sanctions that reflect the gravity of the commodity futures law violations that occurred in this matter; and (2) impose sanctions that not only deter the Respondents from engaging in future conduct contrary to Ontario commodity futures law but other like-minded people as well.

[40] In my opinion, an order permanently barring Khan from being a director or officer of any issuer, requiring disgorgement of all funds obtained in breach of Ontario commodity futures law and requiring that Khan and KTA each pay a

significant administrative monetary penalty is reasonable and warranted in this case. Such an order will signal to the Respondents and to like-minded individuals willing to engage in similar conduct that they will be severely dealt with by the Commission.

[41] I will issue a separate order giving effect to my decision on sanctions and costs where I order that:

- a. Any exemptions contained in Ontario commodity futures law do not apply to the Respondents permanently, pursuant to paragraph 3 of subsection 60(1) of the CFA;
- b. The Respondents be reprimanded, pursuant to paragraph 6 of subsection 60(1) of the CFA;
- c. Khan resign one or more positions that he holds as a director or officer of any issuer, pursuant to paragraph 7 of subsection 60(1) of the CFA;
- d. Khan is prohibited from becoming or acting as a director or officer of any issuer, pursuant to paragraph 8 of subsection 60(1) of the CFA;
- e. Khan pay an administrative penalty of \$200,000 for failure to comply with Ontario commodity futures law, pursuant to paragraph 9 of subsection 60(1) of the CFA;
- f. KTA pay an administrative penalty of \$200,000 for failure to comply with Ontario commodity futures law, pursuant to paragraph 9 of subsection 60(1) of the CFA;
- g. The Respondents disgorge to the Commission the sum of \$366,324.71 obtained as a result of the non-compliance with Ontario commodity futures law, pursuant to paragraph 10 of subsection 60(1) of the CFA;
- h. The Respondents pay a portion of the costs of the Commission investigation and the hearing in the amount of \$191,252.43, pursuant to section 60.1 of the CFA; and

- i. That any amounts paid to the Commission in compliance with paragraph [41](e), (f), or (g) herein, be allocated to or for the benefit of third parties or for use by the Commission for the purpose of educating investors or promoting or otherwise enhancing knowledge and information of persons regarding the operation of the securities and financial markets, in accordance with subsection 3.4(2)(b) of the Act.

Dated at Toronto this 13th day of May, 2015.

"James D. Carnwath"

James D. Carnwath Q.C.